Nos. 96-1550 and 96-1551

Supreme Court, U.S.
FILED
JUL 22 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARYLAND STATE DEPARTMENT OF EDUCATION,
DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND
and DONALD J. MORRIS,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

GREGORY D. HUFFAKER, JR.
HUFFAKER, BARNES & CONWAY, P.C.
155 Grant Avenue
Santa Fe, New Mexico 87501
(505) 988-8921

WILLIAM C. GLEISNER, III *
MARC MAURER
SCOTT C. LABARRE
GLEISNER LAW OFFICES, S.C.
733 North Van Buren Street
Milwaukee, Wisconsin 53202
(414) 390-3200

GEORGE A. SOMERVILLE
MAYS & VALENTINE, L.L.P.
1111 East Main Street
Richmond, Virginia 23218
(804) 697-1200

Counsel for the National Feedration of the Blind and Donald J. Morris

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE RESPONDENTS HAVE MISREAD AND MISAPPLIED THIS COURT'S DECISIONS IN *FRANKLIN* AND *PENA*	2
A. The *Pena* decision, relied on by Respondents, actually Supports the position of the Petitioners	3
B. The Respondents misconstrue the concept of "Remedy," as that term is used by this Court in *Franklin*	4
II. THE BRIEF FOR THE FEDERAL RESPONDENTS SHOWS THEIR CONFUSION, AND IGNORES CONFLICTS, IN THE FEDERAL COURTS' INTERPRETATION OF THE RANDOLPH-SHEPPARD ACT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Abbott Laboratories, et al. v. Gardner, 387 U.S. 136 (1967)	5
Armco Employees Independent Federation, Inc. v. Armco Steel Co., 65 F.3d 492 (6th Cir. 1995)	5
Bell v. Hood, 327 U.S. 678 (1946)	2
Commissioner v. Bilder, 369 U.S. 499 (1962)	6
Delaware Department of Health and Social Services v. United States Department of Education, 772 F.2d 1123 (3d Cir. 1985)	2, 7, 8
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)	2, 3, 4
Georgia Department of Human Resources v. Nash, 915 F.2d 1482 (11th Cir. 1990)	7
Howe v. Bolger, 35 CCH EPD 34,822 (E.D. Wis. 1984)	8
Hudson v. Boxer, 632 F. Supp. 1569 (D. Colo. 1986)	8
Lane v. Pena, 116 S. Ct. 2092 (1996)	3, 4
Maryland State Department of Education v. United States Department of Veterans Affairs, 896 F. Supp. 513 (D. Md. 1995)	3
Maryland State Department of Education v. United States Department of Veterans Affairs, 98 F.3d 165 (4th Cir. 1996)	3, 6
Minnesota Department of Economic Security v. Riley ("Riley II"), 107 F.3d 648 (8th Cir. 1997)	7, 8
Minnesota Mining Co. v. New Jersey Wood Co., 381 U.S. 311 (1965)	6
New York v. United States, 326 U.S. 572 (1946)	2
Oregon Dept. of Fish and Wildlife v. Klamath Tribe, 473 U.S. 753 (1985)	9
Randolph-Sheppard Vendors of America v. Weinberger, 795 F.2d 90 (D.C. Cir. 1986)	6
Rothensies v. Electric Battery Co., 329 U.S. 296 (1946)	7
Saxbe v. Washington Post Co., 417 U.S. 843 (1974)	9
Shapiro v. United States, 335 U.S. 1 (1948)	6

TABLE OF AUTHORITIES—Continued

	Page
Texas State Commission for the Blind v. United States, 796 F.2d 400 (Fed. Cir. 1986)	5
United States v. Ruzicka, 329 U.S. 287 (1946)	7
United States v. National Bank of Commerce, 472 U.S. 713 (1985)	9
United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960)	5
Statutes and Rules	
20 U.S.C. § 107(b)	2
20 U.S.C. § 107d-1	4
20 U.S.C. § 107d-1(a)	8
20 U.S.C. § 107d-1(b)	8
20 U.S.C. § 107d-2	6
20 U.S.C. § 107d-2(a)	5
20 U.S.C. § 107d-2(b)	7
20 U.S.C. § 107d-2(b)(1)	8
20 U.S.C. § 107d-2(b)(2)	8
Administrative Procedure Act	5
United States Supreme Court Rule 15.6 (1997)	1, 5
Miscellaneous	
Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* (BNA 7th Ed. 1993)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 96-1550 and 96-1551

MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

THE NATIONAL FEDERATION OF THE BLIND and DONALD J. MORRIS,
Petitioners,

v.

DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS NFB AND MORRIS

Pursuant to this Court's Rule 15.6, the National Federation of the Blind and Donald J. Morris (collectively, "NFB"), Petitioners, make this Reply to the new points raised in the Federal Responents' Brief in Opposiiton to their Petiiton for a Writ of Certiorari.

Respondents argue that there is no conflict between the Circuits as to the issue in the case at bar. Eighteen States and the national association that represents State agencies for the blind have filed *amici* briefs, however, arguing that

the decision of the Court below deepens an existing conflict among the Circuits and causes serious confusion regarding the Randolph-Sheppard Act ("RSA") throughout the Country. This Court has deemed the involvement of a State as a Petitioner for a Writ of Certiorari to be an important factor in deciding to grant or deny Certiorari (*New York v. United States*, 326 U.S. 572, 574 (1946)), and thus, *a fortiori*, the strongly expressed concerns of so many States should be given substantial weight by the Court in the case at bar.

I. THE RESPONDENTS HAVE MISREAD AND MISAPPLIED THIS COURT'S DECISIONS IN *FRANKLIN* AND *PENA*

Within the meaning of this Court's Rule 15.6, Respondents raise a new point when they argue that *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), is inapposite because the Respondents represent a federal agency.[1] Respondents' Brief, p. 10. Respondents misunderstand *Franklin*. The seminal case of *Bell v. Hood*, 327 U.S. 678 (1946), upon which *Franklin* is directly premised, involved an action against a federal agency (*Id.*, 327 U.S. 679-80, 684), and, as the *Franklin*

[1] The Respondents do not argue, nor could they, that the Act has been unfairly applied to them. The Respondents acknowledge that the Act is "a cooperative federal/state program for licensing, training and placing qualified blind persons as operators of vending facilities on federal property." Respondents Brief, p. 2. The Respondents have acknowledged without objection that the Act applies to them. Respondent's Brief, p. 6, n.5. The States voluntarily undertake to insure the working conditions of blind vendors on federal property and must apply to the United States Secretary of Education for permission to license blind vendors to work on that federal property. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123, 1130-32 (3d Cir. 1985). As pointed out by the National Council of State Agencies for the Blind in its Amici Brief, at pp. 13-20, the Act is not enforced against the Respondents by the States, but by the Secretary of Education pursuant to his authority under 20 U.S.C. § 107(b) and by and through the arbitration panels convened by the Secretary of Education under the Act.

Court noted, the ancient doctrine that there can be no right without a remedy has from time immemorial been applied to Acts of Congress designed to vest citizens with rights against federal agencies ("[t]he Court applied these principles to an Act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers," *Id.*, 503 U.S. at 66).

A. The *Pena* decision, relied on by Respondents, actually supports the position of the Petitioners

Lane v. Pena, 116 S. Ct. 2092 (1996), the only decision relied on by the Respondents to "distinguish" *Franklin*, in fact supports the position of the Petitioners that an RSA panel arbitration award ought to be enforceable in federal court. The case at bar would not exist if the Courts below had enforced the award of the RSA panel below by granting injunctive relief in favor of the State licensing agency ("SLA") requiring the Respondents to surrender space for a blind vendor stand. That was the only relief sought by the SLA below. 896 F. Supp. 514. The award made by the RSA panel below was clearly injunctive in nature,[2] and only injunctive relief is at issue in the case at bar. *Pena* involved an attempt to impose a damage remedy on a federal agency, but did not in any sense foreclose injunctive relief against that agency.[3] As this Court made clear in *Pena*, "The question presented [in *Pena*] is whether Congress has waived the Federal Government's sovereign immunity against *awards of monetary damages* [Emphasis sup-

---

[2] "On October 15, 1994, the [RSA] arbitration panel issued its final order in which it directed the DVA to turn over to Maryland the operation of the retail store already located at the VAMC, . . ." 98 F.3d 168.

[3] In fact, the federal government in *Pena* did not "contest the propriety of injunctive relief" against it under *Franklin*, but only argued that "the Federal Government's sovereign immunity prohibits *wholesale application of Franklin* to actions against the Federal Government to enforce § 504(a) [Emphasis supplied]." *Pena, Id.* at 2099.

plied]."[4] *Pena, Id.*, 116 S.Ct. at 2095. *Pena* has no application to the case at bar.

B. The Respondents misconstrue the concept of "Remedy," as that term is used by this Court in *Franklin*

Under *Franklin*, the power to grant a remedy involves nothing less than the duty of a federal court "to award appropriate relief in cases brought in our court system." *Franklin, Id.*, 503 U.S. at 74. The failure of federal courts to enforce remedies provided by Congress actually violates the Separation of Powers doctrine "by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available." *Id.*

Respondents do not attempt to address the authorities cited in the NFB's Petition at 26-28, that strongly support the conclusion that when Congress mandated that disputes under the RSA be resolved by an arbitration panel the Congress *did not* use "arbitration" in a different sense from that employed in other laws in effect at the time of the 1974 Amendments to the RSA. A commitment to arbitration by Congress in 1974 includes a policy judgment that arbitrators are to adjudicate all of the issues of a dispute under 20 U.S.C. § 107d-1, including the determination of a remedy.

Respondents' argument regarding *Franklin* also indirectly raises for the first time the power of a court to review a decision of an arbitrator. Under arbitration law as it clearly existed in 1974, and which the Congress undoubtedly considered when it employed the concept of final and binding arbitration in the 1974 Amendments

---

[4] The NFB does not concede that an RSA panel cannot award monetary damages against a federal agency under the Act. Certainly, it could be argued that the Congress has waived sovereign immunity by enacting the RSA. However, the issue of monetary damage relief is not before the Court under the facts of the case at bar.

to the RSA, "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration. . ." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960). Judicial review is nevertheless necessary, but "courts have essentially one role—to place government authority behind an award in order to enforce it." *Armco Employees Independent Federation, Inc. v. Armco Steel Co.*, 65 F.3d 492, 495-96 (6th Cir. 1995). The failure of the Court below to enforce an award of an arbitration panel also contravenes the intent of Congress in making every arbitration award under the RSA "subject to . . . review as a final agency action" under the APA. 20 U.S.C. § 107d-2(a). *See Abbott Laboratories, et al. v. Gardner*, 387 U.S. 136, 139-40 (1967) ("the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable interpretation' ").

II. THE BRIEF FOR THE FEDERAL RESPONDENTS SHOWS THERE IS CONFUSION, AND IGNORES CONFLICTS, IN THE FEDERAL COURTS' INTERPRETATION OF THE RANDOLPH-SHEPPARD ACT

Respondents argue that no conflict or confusion exists in the courts below. These attempts to raise new points, within the meaning of this Court's Rule 15.6, are not well taken. In a case ignored by the Respondents, *Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986),[5] an RSA panel awarded $10 million dollars against a federal agency. *Id.*, 403-406. The federal government vigorously contested that award, but it did not question the arbitration panel's authority to make such an award, nor did any of the ten judges of the Federal Circuit in that case question the panel's basic authority to make such an award. The *Texas* decision clearly conflicts with the decisions of the Courts below that an RSA panel "has no remedial powers whatsoever."

---

[5] Cited at pp. 4 and 11 of the NFB's Petition and discussed at p. 15 of same.

Respondents dismiss the decision in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90 (D.C. Cir. 1986) as dicta. In fact, the Court in *Weinberger* confronted a fact situation which demanded that it consider carefully the remedial powers of an RSA panel convened to resolve a dispute between an SLA and a federal agency, and its discussion of the remedial powers of such a panel forms an indispensable part of its holding.

Weinberger involved very large contracts between federal agencies and the Burger King and McDonald fast food corporations. *Id.* The Court in *Weinberger*, squarely faced with a challenge to the validity of those contracts, concluded, by specific reference to 20 U.S.C. § 107d-2 (*Id.*, at 109), that there were a wide variety of remedies available by means of arbitration, including even invalidation of those contracts, limitations on making such contracts in the future, and other "prospective relief." *Id.* Far from dicta, a determination of the remedial powers of an RSA panel was a necessary element of the Court's reasoning that enabled the Court to determine that the parties could and must place their dispute, including remedies, before an RSA panel and exhaust their administrative remedies before seeking relief in federal court.

Perhaps most telling, however, the Court below did not dismiss as dicta but instead specifically declined to follow *Weinberger*, on the ground that the District of Columbia Circuit's construction of the RSA failed to give full effect to all of the language of the RSA. *Maryland, Id.*, 98 F.3d at 170. This Court has often granted Certiorari when there is a conflict among the Circuits as to the construction of a statute that impacts on the proper administration of an Act of Congress. *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (there was a conflict and "the need for a uniform rule on the point"); *Minnesota Mining Co. v. New Jersey Wood Co.*, 381 U.S. 311, 314 (1965) and *Shapiro v. United States*, 335 U.S. 1, 4 (1948) ("because this conflict involves an important question of statu-

tory construction"); *See also, United States v. Ruzicka*, 329 U.S. 287 (1946).

Respondents seize upon the Eighth Circuit's strained conclusion in *Minnesota Department of Economic Security v. Riley ("Riley II")*, 107 F.3d 648 (8th Cir. 1997), that the decision of the Court below is not in conflict with the Eighth Circuit's decision, without considering the obvious. As noted by the Commonwealth of Virginia, et al., *Amici* Brief, 14-15, in the Eighth Circuit an SLA of a State can have an arbitration award of an RSA panel enforced in Court (107 F.3d at 649), but an SLA in the Fourth Circuit cannot. At minimum, there is confusion in the two Circuits concerning the power of a federal court to enforce an arbitration award of a panel under the Act. In other words, there is a disagreement between the Circuits as to the very basic question of how the RSA is to be enforced in those Circuits, and this Court has granted Certiorari when such a conflict threatens to become a serious hindrance to the effective administration of an Act of Congress. *Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1946).

Respondents dismiss the other cases that conflict with the decision below in a footnote (Respondents' Brief, 12, n.8), without providing any meaningful discussion of the basis for their conclusion. For example, Respondents argue that *Delaware Department of Health & Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985), is inapposite because it involves on its facts 20 U.S.C. § 107d-2(b)(1).[6] In fact, the *Delaware* decision contains a thoughtful and careful anal-

[6] In so doing, Respondents overlook the fact that the Courts below rely primarily on *Georgia Department of Human Resources v. Nash*, 915 F.2d 1482 (11th Cir. 1990), which case also involves on its facts 20 U.S.C. § 107d-2(b)(1). In a real sense, however, the Respondents do both the Court and the cause of justice a favor because this underscores as nothing else could the confusion among the Circuits.

ysis of the common underpinnings of panels convened pursuant to both 20 U.S.C. § 107d-2(b)(1) and (b)(2). Based on that analysis, the Court in *Delaware* concluded that because blind vendors are third party beneficiaries of the relationship between the States and the federal government (*id.*, at 1127), arbitration of disputes between SLAs and federal agencies "were included primarily to deal with the disputes which had often arisen in the administration of the Randolph-Sheppard Program when certain federal departments were unwilling to provide sites for blind vendors." *Id.*, at 1129.

CONCLUSION

The serious confusion among the Circuits concerning the Act was captured best by the authors of the Commonwealth of Virginia, et al.'s *Amici* Brief in support of the Petitions herein for Certiorari:

> The current status of the law is that 1) in the Third Circuit (*see Delaware Dept. of Health*), a blind licensee may recover compensatory damages and attorneys' fees in an arbitration against a State licensing agency under § 107d-1(a); 2) in the Eleventh Circuit (*see Nash*)—and probably in the Fourth Circuit, in view of its reliance on *Nash* in the decision below—an RSA arbitration panel may not grant *any* form of relief in an arbitration under the same statute; 3) in the Fourth Circuit (*see* decision below), a § 107d-1(b) arbitration panel has no remedial authority and a district court may not enforce its decision; and 4) in the Eighth Circuit (*see Riley II*) the remedial authority of a § 107d-1(b) arbitration panel is not clear, but it *is* clear that a district court may enter an injunction enforcing a panel's decision; and 5) at least in Colorado (*see Hudson v. Boxer*, 632 F. Supp. 1569 (D. Colo. 1986) [and in Wisconsin, *see Howe v. Bolger*, 35 CCH EPD 34,822 (E.D. Wis. 1984)], blind vendors may obtain a preliminary

> injunction against State officials to maintain the status quo pending arbitration.

Commonwealth of Virginia, et al. Amici Brief, pp. 15-16.

Clearly, the enforceability of the rights of the blind under the RSA varies tremendously with geography. If nothing else, there is a great deal of confusion concerning the meaning of the RSA and, as noted in the NFB's Petition, this Court ought to grant Certiorari just to resolve that confusion. Stern, Gressman, Shapiro, and Geller, *Supreme Court Practice* 180 (BNA 7th Ed. 1993). Certainly, there "appears" to be a conflict among the Circuits, and such an appearance of a conflict has been the basis in the past of this Court's assertion of Certiorari Jurisdiction. *See Saxbe v. Washington Post Co.,* 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce,* 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 753, 764 (1985) ("appeared to conflict in principle").

The Randolph-Sheppard Act creates rights to economic opportunity for a distinctly disadvantaged class in American society. None of the briefs filed in this case, including the Respondents' Brief in Opposition, question the rights defined and declared by Congress in the Randolph-Sheppard Act. However, the Petitions and the briefs filed in this case, including the Respondents' Brief in Opposition, manifest confusion and conflict about the procedure for securing those rights. Blind citizens nationwide, and their patron SLAs in the fifty States, deserve to know from this Court, finally, what the proper procedure is for securing those rights.

Respectfully submitted,

GREGORY D. HUFFAKER, JR.
HUFFAKER, BARNES & CONWAY, P.C.
155 Grant Avenue
Santa Fe, New Mexico 87501
(505) 988-8921

WILLIAM C. GLEISNER, III *
MARC MAURER
SCOTT C. LABARRE
GLEISNER LAW OFFICES, S.C.
733 North Van Buren Street
Milwaukee, Wisconsin 53202
(414) 390-3200

GEORGE A. SOMERVILLE
MAYS & VALENTINE, L.L.P.
1111 East Main Street
Richmond, Virginia 23218
(804) 697-1200

Counsel for the National Federation of the Blind and Donald J. Morris

* *Counsel of Record*